

## Right”: the Constitutional Basis of Consumer Protection

### *Introduction*

The interdisciplinary idea of consumer protection has had its influence upon economics, sociology and law since the middle of the 20<sup>th</sup> century, all over the world's countries having market economy. It has spread to more and more fields of law, primarily to private law, but also to administrative and even to criminal law.<sup>1</sup> Its notion aims to create a balanced situation between the two participants of the market, the consumer and the manufacturer or trader, in order to provide the consumer with an optimal chance of decision, meaning that their interest could prevail in the possibly most efficient way.<sup>2</sup> These two actors are connected mostly through private transactions, therefore private substantial law has a very important role in helping and shielding the weaker, uninformed consumers from traders, having a stronger market position and often taking advantage of that.<sup>3</sup>

Since the notion of consumer protection developed in states of market economy, it has raised the question whether and in what degree a state can intervene into economic life and into the transactions of its citizens and legal entities. How much power shall a state constitution have in the recovery of the private law balance of power that was upset by the enormous financial interests, typical of trade in modern times? Is it possible to define the protection of consumers' rights today as an economic fundamental right?

In my study I am looking for the answer to these questions, setting out from the fact that the new Constitution of Hungary, entering into effect on 1<sup>st</sup> January, 2012 contains a concrete provision concerning the protection of consumers. My aim is to make a comparison between former and future Hungarian constitutional rules with the legal policy and legislation of the European Union, and also with the provisions of the constitutions of European Union member states. I would like to suggest problems and controversies deriving from the new Hungarian constitutional regulation, as well.

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<sup>1</sup> FAZEKAS Judit: *Fogyasztóvédelmi jog*, Complex, Budapest, 2007. 74.

<sup>2</sup> Ibid. 71.

<sup>3</sup> Ibid.

The Constitutional Concept of Economic Rights and Principles – in relation with Consumer Protection – in the Constitution of the Republic of Hungary  
Many provisions of the Constitution of the Republic of Hungary were amended in 1989, in order to help the state to transform its political and economic system. That was the time when the nature of the economy of Hungary was determined constitutionally:

„The economy of Hungary is a market economy [...] The Republic of Hungary recognizes and supports the right to enterprise and the freedom of competition in the economy.”<sup>4</sup>

The definition of market economy, as the economic system of a state basically requires the recognition and acknowledgement of economic freedoms and rights, that is, the economic autonomy of citizens.<sup>5</sup>

The Constitutional Court of Hungary has set up the types of rights in the light of their enforceability in one of its decisions.<sup>6</sup> According to this, there are „classic protective fundamental rights”, „state goals and responsibilities”, and „social rights”.<sup>7</sup>

The Constitutional Court determined that *market economy* is a constitutional declaration without any authorization upon the state to intervene into economic life, meaning that it is neither a fundamental right, nor a constitutional right, but an economic policy having constitutional limits.<sup>8</sup> However, since it is connected to several fundamental or constitutional rights or principles, it has not only a subjective side affecting individuals, but it indicates the „objective institution-protective obligation” of the state, as well.<sup>9</sup>

The *freedom of competition* is not a fundamental right, either, but a certain condition of market economy, in which the abovementioned obligation of the state needs to be exercised,<sup>10</sup> and, in connection with it, consumer protection shall also be enforced.<sup>11</sup>

According to the Constitutional Court of Hungary, the *right to enterprise* is a real fundamental right that has its constitutional barriers in market economy and in the freedom of contract.<sup>12</sup> In this context, we are approaching the issue of consumer protection in private law, in connection with constitutional protection. Its notion affects the freedom of contract, the fundamental principle of private law, and particularly the law of obligations in general.<sup>13</sup>

The *freedom of contract* – in the interpretation of the Constitutional Court – is a constitutional right and also the core element of not only the market economy, but also the right

<sup>4</sup> XX. Act of 1949 on the Constitution of the Republic of Hungary (amended by the I. Act of 1989), Article 9 (1)-(2), the English version is available: <http://net.jogtar.hu/jr/gen/getdoc.cgi?docid=94900020.tv&dbnum=62> (15. 11. 2011.)

<sup>5</sup> DRINÓCZI Tímea: A piacgazdaság és a versenyszabadság – alkotmányjogi értelemben. *Jogtudományi Közöny* LIX. évf., 7-8 (2004) 231., 233.; NAGY Gusztáv: *A piacgazdaság és egyes ezzel összefüggő gazdasági alapjogok, alkotmányos alapelvek értelmezési, továbbfejlesztési lehetőségei az új Alkotmány kapcsán*. In: Molnár Borbála – Gyombolai Zsolt – Téglási András (szerk.): *Gazdasági alapjogok és az új magyar Alkotmány*. Országgyűlés Emberi jogi, kisebbségi, civil- és vallásügyi bizottsága, Budapest, 2011. 107.

<sup>6</sup> SÁRI János – SOMODY Bernadette: *Alapjogok. Alkotmánytan II.* Osiris, Budapest, 2008. 45.

<sup>7</sup> The „right to a healthy environment” is a unique type among the others, see: Constitutional Court Decision 28 of 1994 (20/05), the English version is available: [http://www.mkab.hu/admin/data/file/749\\_28\\_1994.pdf](http://www.mkab.hu/admin/data/file/749_28_1994.pdf) (30/11/2011).

<sup>8</sup> See: SÁRI – SOMODY, 2008. 244.; Constitutional Court Decision 33 of 1993 (28/05).

<sup>9</sup> DRINÓCZI, 2004. 233.

<sup>10</sup> See: Constitutional Court Decision 21 of 1994 (16/06) and 59 of 1991 (19/11).

<sup>11</sup> See justice István Kukorelli’s parallel reasoning of the Constitutional Court Decision 1270/B of 1997.

<sup>12</sup> See also: Constitutional Court Decision 21 of 1994 (16/06).

<sup>13</sup> See: IV. Act of 1959 on the Civil Code of Hungary, Section 200 (1): „The parties may determine freely the content of the contract”, the English version is available: <http://www.lawandtranslation.com/szolgalatasaink/jogszabalyok/1959evi4> (15. 11. 2011.)

to enterprise and the freedom of competition.<sup>14</sup> It is such, even though it is expressed only in the Civil Code of Hungary and not in the Constitution itself. The Constitutional Court also held that it derives from the constitutional requirements of the rule of law,<sup>15</sup> and, therefore from legal certainty.<sup>16</sup>

Despite this kind of nature, the freedom of contract may be limited even in its essential content.<sup>17</sup> This limitation is due to the economic changes nationally and internationally, as well, and has prominent areas, such as the „restriction of competition, cartel law, abuse of dominant position, control of mergers, price regulation, standard contracts, environment protection and consumer protection, et cetera...“<sup>18</sup>

In the decision 61 of 1993, the Constitutional Court argued that these limits shall not be discriminative depending on the parties being private individuals or persons exercising economic activity. However, in my opinion, in case of consumer protective provisions limiting the freedom of contract on the side of traders, we are dealing with positive discrimination, which has its reasons in the abovementioned upset of the balance of powers in private law.<sup>19</sup>

#### Provisions and Principles of European Union Law upon Consumer Protection

The idea of consumer protection has its basis in the law of the European Union, as well. However, it was not the original aim of the European Economic Communities. It was first expressed in 1975, in the „Preliminary Programme of the European Economic Community for a Consumer Protection and Information Policy“, which is usually referred as the „Magna Charta of Consumer Protection“.<sup>20</sup> This programme named five basic consumer rights, which are mainly in connection with private substantial and procedural law:

- (a) „the right to the protection of health and safety,
- (b) the right to the protection of economic interests,
- (c) the right of redress,
- (d) the right to information and education,
- (e) the right of representation (the right to be heard).“<sup>21</sup>

The current text of the Treaty on the Functioning of the European Union says that „Consumer protection requirements shall be taken into account in defining and implementing other Union policies and activities.“<sup>22</sup> This text probably refers fundamentally to the Magna Charta.

The Charter of Fundamental Rights of the European Union has gained legal force due to the Lisbon Treaty on 1<sup>st</sup> December 2009. This document contains the protection of consumers – as a fundamental right of EU citizens – among the rules on Solidarity: „Union policies shall ensure a high level of consumer protection.“<sup>23</sup>

<sup>14</sup> See: Constitutional Court Decision 13 of 1990 (18/06) and 32 of 1991 (6/06) and 61 of 1993 (29/11) and 43 of 1991 (12/07).

<sup>15</sup> Constitution of the Republic of Hungary, Article 2 (1).

<sup>16</sup> Constitutional Court Decision 32 of 1991 (6/06).

<sup>17</sup> Constitutional Court Decision 61 of 1993 (29/11) and 31 of 1998 (25/06).

<sup>18</sup> Constitutional Court Decision 32 of 1991 (6/06), translation of the author; see also: BALOGH Zsolt et al.: *Az Alkotmány magyarázata*. KJK-Kerszöv, Budapest, 2003. 248.

<sup>19</sup> See also: Constitutional Court Decision 254/B of 1992.

<sup>20</sup> See: FAZEKAS, 2007. 22.

<sup>21</sup> See: Introduction, 3.

<sup>22</sup> Article 12.

<sup>23</sup> Article 38; the „freedom to conduct a business“ can be found in Article 16.

In my opinion, the text-drawing of these documents of the European Union may indicate basically the abovementioned objective institution-protective obligation of the European Union in a wider sense, and of the member states in a narrower sense, which can materialize primarily in legislation.

The constitutional provisions of certain European Union member states  
I find it useful to examine which European Union member states' legislators considered consumer protection as a matter of constitutional importance. Let us now see these relevant constitutions related to the regulation of consumer protection.

Only four – with the new Hungarian, five – of the 27 countries' constitutions contain specific provisions on consumer protection, namely: the constitutions of Spain, Portugal, Poland and Bulgaria.<sup>24</sup> It is so, even though more constitutions contain catalogues of economic and social rights or principles.<sup>25</sup>

### Constitution of Spain

The Constitution of Spain is an example that gives specified consumers' rights enumeration, mentioning their rights to safety, health and economic interests, information, education, and organizing.<sup>26</sup> This specification is in compliance with the European Union enumeration, and it may give an exact way to legislation concerning consumer protection. These provisions are placed among the rules of the Spanish Constitution on „Principles Governing Economic and Social Policy”, therefore they are probably determined as requirements on the side of the Spanish state as a part of its objective institution-protective obligation.

### Constitution of Portugal

The Constitution of Portugal contains provisions on consumer protection in the chapter on „Economic Rights and Duties” and also provides an itemized catalogue of consumers' rights.<sup>27</sup> In my opinion – in the light of the types of constitutional provisions regarding citizens, in the interpretation of the Hungarian Constitutional Court<sup>28</sup> –, here we may be deal-

<sup>24</sup> The Hungarian translation of the constitutions of European Union member states (except Romania and Bulgaria) can be found in: TRÓCSÁNYI László–BADÓ Attila: *Nemzeti alkotmányok az Európai Unióban*. KJK-Kerszöv, Budapest, 2005.

<sup>25</sup> Such as the constitutions of Ireland and Slovenia.

<sup>26</sup> Constitution of Spain, Section 51: „(1) The public authorities shall guarantee the protection of consumers and users and shall, by means of effective measures, safeguard their safety, health and legitimate economic interests.

(2) The public authorities shall promote the information and education of consumers and users, foster their organizations, and hear them on those matters affecting their members, under the terms established by law.

(3) Within the framework of the provisions of the foregoing paragraphs, the law shall regulate domestic trade and the system of licensing commercial products.

Section 52: The law shall regulate the professional organizations which contribute to the defence of their own economic interests. Their internal structure and their functioning must be democratic.”, the English version is available: [http://www.senado.es/constitu\\_i/indices/consti\\_ing.pdf](http://www.senado.es/constitu_i/indices/consti_ing.pdf) (11. 10. 2011.)

<sup>27</sup> Constitution of the Portuguese Republic, Article 60 (Consumer Rights):

„1. Consumers shall possess the right to the good quality of the goods and services consumed, to training and information, to the protection of health, safety and their economic interests, and to reparation for damages.

2. Advertising shall be regulated by law and all forms of concealed, indirect or fraudulent advertising shall be prohibited.

3. Consumers' associations and consumer cooperatives shall possess the right, as laid down by law, to receive support from the state and to be heard in relation to consumer-protection issues, and shall possess *legitimatío ad causam* in defence of their members or of any collective or general interests.”, the English version is available: [http://app.parlamento.pt/site\\_antigo/ingles/cons\\_leg/Constitution\\_VII\\_revisao\\_definitive.pdf](http://app.parlamento.pt/site_antigo/ingles/cons_leg/Constitution_VII_revisao_definitive.pdf) (11/10/2011).

<sup>28</sup> See above.

ing with real fundamental rights.<sup>29</sup> The text-drawing indicates that these rights do not only bind legislators but also any individuals and especially traders and enterprises in the course of their commercial activities. This constitution is unique in this sense.

The provisions include the rights to good quality goods and services, to training and information, to the protection of health, safety and their economic interests, to correct advertising, and to founding associations and cooperatives. They are mentioned directly as consumers' rights, basically deriving from private law, and they also reflect entirely the earlier cited EU Magna Charta. In my opinion, the most remarkable of them is the right to reparation for damages, which directly indicates the enforceability of a civil claim before courts.

In its second part on the „Organization of the Economy“, the Constitution of Portugal also contains the protection of consumers' rights and interests as the primary task of the state, that is, as one of its objective protective obligations.<sup>30</sup> Therefore, it can be said that this constitution provides the broadest protection to consumers at state-level among the EU member states, including expressly the subjective and objective sides of the protection, as well.

#### Constitution of Poland

The drawing of the Constitution of Poland refers to consumer protection directly as an obligation on the side of the state, saying that it is the task of legislators to specify the provision.<sup>31</sup> However, it also mentions the interests of consumers that must be protected, namely health, privacy, and safety.

#### Constitution of Bulgaria

According to the Constitution of Bulgaria, protecting consumers is a means of the state to provide equal legal conditions for economic activities. In its text-drawing, the objective institution-protective obligation is emphasized, and there is no word about specific rights.<sup>32</sup>

#### The Regulation of the New Constitution of Hungary Concerning the Protection of Consumers

The new Constitution of Hungary has modified the provisions upon the economic rights and principles, as well. Its text disposes:

„The economy of Hungary shall be based upon work which creates value and freedom of enterprise. Hungary shall ensure the conditions for fair economic competition, act against any abuse of a dominant position, and shall defend the rights of the consumers.”<sup>33</sup>

If we compare this provision to the Constitution of the Republic of Hungary, we may make two observations: on the one hand, it does not include the principle of market econ-

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<sup>29</sup> See: Justice István Kúrokelli's parallel reasoning of the Constitutional Court Decision 1270/B of 1997.

<sup>30</sup> Constitution of Portugal, Article 81 (i): „to ensure consumer rights and interests.”

<sup>31</sup> Constitution of the Republic of Poland, Article 76: „Public authorities shall protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices. The scope of such protection shall be specified by statute.” (among the „Economic, social and cultural freedoms and rights”), the English version is available: [http://www.poland.pl/info/information\\_about\\_poland/constitution/ch2.htm](http://www.poland.pl/info/information_about_poland/constitution/ch2.htm) (11/10/2011).

<sup>32</sup> Constitution of Bulgaria, Article 19 (2): „The economy of the Republic of Bulgaria shall be based on free economic initiative. The State shall establish and guarantee equal legal conditions for economic activity to all citizens and legal entities by preventing any abuse of a monopoly status and unfair competition, and by protecting the consumer.”, the English version is available: <http://www.parliament.bg/en/const> (13/10/2011).

<sup>33</sup> Fundamental Law of Hungary, Article M) Subsection (2), the English version is available: <http://www.kormany.hu/download/4/c3/30000/THE%20FUNDAMENTAL%20LAW%20OF%20HUNGARY.pdf> (09. 10. 2011.)

omy, but mentions economic competition and freedom of enterprise. It may be problematic, regarding that the current practice of the Constitutional Court handles the latter as the core elements of market economy.<sup>34</sup> On the other hand, it applies restrictions, namely that the economic competition needs to be fair and has to lack the abuse of power in case of people in superior positions, and in connection with these, the rights of consumers need to be protected. This reminds the most of the text of the Constitution of Bulgaria, and it seems that our legislator also wanted to emphasize the consumer protective obligation of the state.

### The Necessity of Expressed Constitutional Provisions on Consumer Protection

What can be the reason of the Hungarian legislator for making consumer protection a constitutional provision?

As we have seen, not so many European Union member states' constitutions contain it specifically. However, the changes in economic life in the past decades, and the requirements deriving from EU legislation have made consumer protection an essential element of the law-making process in all kinds of matters. This fact may justify the necessity of consumer protective constitutional provisions.

Several academic experts, such as Professor Antal Ádám, the former Constitutional Court justice, suggested that there are certain issues that the new Hungarian Constitution shall, by all means, dispose of: „The role of consumer protection and rights deriving from consumer protection should be determined in the new Constitution as the obligation of traders and suppliers, and as an important task of the state, and also as the right of consumers.”<sup>35</sup> In my opinion, this indicates the necessity for establishing it as a fundamental right. Earlier, Professor Antal Ádám referred to fundamental rights not only as substantive rights, but also as procedural entitlements.<sup>36</sup>

Consumers' private rights – as entitlements – may be referred and enforced by individuals mostly in civil lawsuits.<sup>37</sup> According to the opinion of the Constitutional Court: „The rule of law materialize thereby that the Constitution is actually in effect and free of conditions” and „not only rules of law and state and the operation of state bodies need to be in conformity with the Constitution, but also its ... values have to pervade the whole society.”<sup>38</sup> It may mean that the subjective side of constitutional provisions should always prevail in law enforcement.

In relation to the referred economic rights, however, it might not be true. The Conception of the New Civil Code of Hungary says that „Private law individuals are not the addressees of constitutional provisions directly; norms of the Constitution bind directly only state bodies, primarily legislative bodies. Consequently, this means that the principles and itemized norms of the Constitution affect private legal relations and those parties not di-

<sup>34</sup> See: ARATÓ András – HALMAI Gábor – KIS János (szerk.): Vélemény Magyarország Alaptörvényéről. *Fundamentum* XV. évf., 1 (2011) 68.

<sup>35</sup> ÁDÁM Antal: A magyar Alkotmányból hiányzó alapértékekről. *Közjogi Szemle* II. évf., 1 (2009) 433.; ÁDÁM Antal: Észrevételek a magyar alkotmányozáshoz. *Jura* XVII. évf., 1 (2011) 198.

<sup>36</sup> ÁDÁM Antal: *Alkotmányi értékek és alkotmánybíráskodás*. Osiris, Budapest, 1998. 50.

<sup>37</sup> Considering that the present status of the conciliation bodies – as administrative bodies – in Hungary, and concerning that law enforcement is not satisfactory, as their decision can only be enforced if both parties of the legal dispute agree to accept it as legally binding, and furthermore consumers are not well informed about this possibility of law enforcement; see: CLV. Act on Consumer Protection, Section 29 (8) and 32.

<sup>38</sup> Constitutional Court Decision 11 of 1992 (5/03), translation of the author.

rectly, but only by the transmission of private law norms”.<sup>39</sup> In conformity with this, according to the general practice of courts, decisions are not based solely and directly upon the provisions of the Constitution, but on the statutes executing these provisions.<sup>40</sup> Hungarian legislation gave way to consumer protection in the past 10-15 years, without its constitutional declaration, and the legal practice also reflected it.

### Raising Problems

It might not change the current legal policies in private law so much, and not even in private law-enforcement, that the new Constitution of Hungary contains consumer protection in the way it was mentioned. Even before adopting the new Constitution, scholars said that consumers’ rights can be derived from certain constitutional provisions,<sup>41</sup> therefore these could constitute the basis for consumer protective legislation and jurisdiction.

However, there are certain issues that may raise questions in relation with consumers’ protection gaining a constitutional basis. The most problematic of these, in my opinion, is that a standard definition of the consumer does not exist in the legal norms of Hungary.

Particularly in private law, there are more and more laws that are devoted to protect the interests of consumers. In some cases they give an exact definition of them, but in other cases they refer to another norm, such as the act on consumer protection or the Civil Code. The former applies only to private individuals,<sup>42</sup> but the latter provides a broad-scope definition, including legal entities, as well;<sup>43</sup> this may be reversed by the new Civil Code, but it is not in force yet, and it is not determined to be the valid or principal definition.

In my opinion, even if the new constitutional provision imposes obligation directly only upon the state, it would be essential to determine the group of people that needs to be protected.

### Summary

In my study, I aimed to observe the constitutional relevance of consumer protection in Hungary. I introduced the interpretation of the Constitutional Court of Hungary concerning market economy, the freedom of competition, the right to enterprise, and the freedom of contract in order to see the dogmatic approach to these private law-natured provisions.

The main question of my study was how the state legislation may intervene into private law limiting primarily the freedom of contract by giving consumer protection a constitutional basis. I found it important to cite the most relevant laws of the European Union legislation, that may justify the disposing of consumer protection constitutionally. I also referred to and examined those four constitutions of the European Union member states that expressly contain it.

<sup>39</sup> The Conception of the New Civil Code of Hungary, accepted by 1003/2003. (25/01) Government Decree, [http://www.jogalkotas.hu/files/az\\_uj\\_ptk\\_koncepcioja.pdf](http://www.jogalkotas.hu/files/az_uj_ptk_koncepcioja.pdf) (21/11/2011), 3., translation of the author; see also: VÉKÁS Lajos: A szerződési szabadság alkotmányos korlátai. *Jogtudományi Közöny* LIV. évf., 2 (1999) 56.

<sup>40</sup> SÁRI-SOMODY, 2008. 373.; see also: HALMAI Gábor: Az alkotmány mint norma a bírói jogalkalmazásban. *Fundamentum* 2. évf., 3 (1998) 79.; this is expressly said, for instance, in the Constitution of Malta, Article 21.

<sup>41</sup> See for instance the above cited Justice István Kukorelli’s parallel reasoning of the Constitutional Court Decision 1270/B of 1997.

<sup>42</sup> Act on Consumer Protection, Section 2 (d): „consumer: natural person acting out of their independent professional or economic interests, who buys, orders, gets, uses, receives goods, or who is the addressee of the commercial communication or offer concerning the goods.”, translation of the author.

<sup>43</sup> Civil Code of Hungary, Section 685 (d): „consumer shall mean any person who is a party to a contract concluded for reasons other than economic or professional activities.”, the English version is available: <http://www.lawandtranslation.com/szolgaltatasaink/jogszabalyok/1959evi4> (15. 11. 2011.)

I reached the conclusion that the Hungarian legislator decided to include the protection of consumers into the new Constitution of Hungary in a way that it has rather become a leading principle in legal policy and legislation, but not a concrete right, entitling individual consumers to enforce their private claims. In my opinion, this way the concrete provision on consumer protection in the new Constitution will not change so much of the previous and present practice in Hungarian legislation, and even less in law enforcement.

## NAGY ÉVA

### Gazdasági autonómia kontra „gazdasági alapjog”: a fogyasztóvédelem alkotmányos alapja (Összefoglaló)

Tanulmányom célja a fogyasztóvédelem alkotmányos relevanciájának vizsgálata Magyarországon 2012. január 1-jén hatályba lépő új Alaptörvényének fényében. Az első részben bemutatom az Alkotmánybíróságnak a hatályos Alkotmányunk 9. §-ában szereplő, magánjogi természetű gazdasági jogokkal és alapelvekkel kapcsolatos gyakorlatát és az azokra vonatkozó értelmezési elveit.

Fő kérdésem az, hogy a törvényhozó beavatkozása a magánjogba azáltal, hogy alkotmányos rangra emeli a fogyasztók védelmét, milyen változást hozhat a törvényhozásban és a polgári jogi jogalkalmazásban. Fontosnak tartom megemlíteni az Európai Unió releváns normáit, melyek igazolhatják a fogyasztóvédelemről való alkotmányos rendelkezést. Megvizsgálom azon négy Európai Unió tagállami alkotmány rendelkezéseit is, melyek kifejezetten tartalmazzák a fogyasztók védelmét.

Tanulmányomban arra a következtetésre jutok, hogy a magyar törvényhozó úgy döntött, oly módon építi be az új Alaptörvénybe a fogyasztók védelmét, hogy az inkább a jogpolitikára és a törvényhozásra vonatkozó alapelv, de nem egy alapjog, amely feljogosítaná a fogyasztókat a jogaik érvényesítésére. Úgy vélem, hogy ebben a formában az Alaptörvény konkrét rendelkezése deklaratív jellegű, és nem hoz majd gyökeres változást sem az eddigi és a jelenlegi törvényhozási gyakorlatban, sem a magánjogi jogérvényesítésben.